United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1434

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P/S

To be argued by
HILLEL HOFFMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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DONALD WALLACE, et al., :

Plaintiffs-Appellees, :

-against- : Docket No. 74-1434

MICHAEL KERN, et al., :

Defendants-Appellants. :

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BRIEF AND APPENDIX OF APPELLANT JUSTICES OF THE SUPREME COURT, KINGS COUNTY

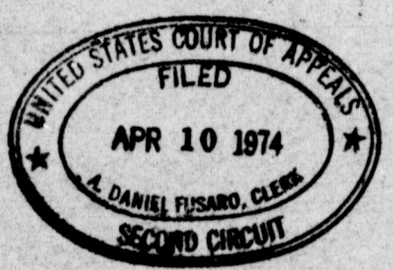

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TABLE OF CONTENTS

TABLE OF CASES

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----------X

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BRIEF FOR APPELLANT JUSTICES OF
THE SUPREME COURT, KINGS COUNTY

Preliminary Statement

This is an appeal from a decision and order of the United States District Court for the Eastern District of New York (Judd, D.J.), dated March 7, 1974 and March 26, 1974, granting a preliminary injunction on behalf of plaintiffs-appellees, and establishing a speedy trial rule for detainees accused of felonies in Kings County. On April 2, 1974, this Court granted a stay of the District Court's order pending appeal, and directed that the appeal be heard during the week of April 22, 1974.

Questions Presented

1. Whether the court below properly ordered that all detainees accused of felonies in Kings County who are incarcerated more than six months, and all detainees accused of murder in Kings County who are incarcerated more than nine months, may make a written request for a speedy trial in the Kings County Supreme Court, and be released on their own recognizance if they are not brought to trial within forty five days?

2. Whether the Court below properly granted this relief to all detainees in Kings County as a class, without regard to the facts of individual cases or to the merits of individual speedy trial claims?

3. Whether the Court below properly ordered that any delay caused by a detainee in bringing his case to trial would be chargeable to him only during the forty five day period after he had requested a speedy trial, but not during the initial six month or nine month period prior to such a request?

4. Whether in a civil rights action rather than a habeas corpus proceeding, the Court below properly ordered the release of detainees on their own recognizance, where there was no showing of exhaustion of state remedies by the members of plaintiffs' class?

5. Whether the decision and order of the District Court undermined the operation of a state statute, New York Criminal Procedure Law, Section 30-30, without the convening of a three judge court and without proper consideration of that issue?

Statement of the Case

This is the second time that Wallace v. Kern is before this Court on an expedited appeal from a grant of a preliminary injunction on behalf of plaintiffs-appellees. The previous appeal was filed under Docket Numbers 73-1826, 73-1830 and 73-1831, and will be discussed in following statement of the case.

The action was commenced by a group of inmates of the Brooklyn House of Detention on June 30, 1972, alleging that six Justices of the Supreme Court, Kings County had violated their constitutional rights. On July 11, 1972 District Judge Weinstein issued an order permitting plaintiffs to proceed in forma pauperis, and on July 20, 1972 Judge Weinstein assigned counsel to represent plaintiffs. On August 1, 1972 Judge Weinstein directed plaintiffs' attorneys to confine their allegations to patterns and practices of the Kings County Supreme Court, and not to the conduct of individual judges.

On October 16, 1972, plaintiffs filed their first amended complaint, containing seven causes of action against all of the Justices of the Supreme Court, Kings County. Plaintiffs complained of delays in trial, excessive bail, ineffective assistance of counsel, denial of opportunities to present pro se motions, secret indictments, non-production of detainees in court, and coerced guilty pleas. On November 14, 1972, the appellant Justices moved to dismiss the amended complaint.

Subsequently, on December 14, 1972, Judge Weinstein disqualified himself from the case, and the matter was assigned to Judge Judd. On January 29, 1973, plaintiffs filed a second amended complaint against the Justices of the Kings County Supreme Court, containing eight causes of action that were similar to the causes of action in the first amended complaint. Plaintiffs further alleged that detainees in Kings County were subjected to cruel and unusual punishment by reason of lengthy pre-trial delays, and that detainees were denied the equal protection of the law because they were indigent.

On February 2, 1973, the appellant Justices moved to dismiss the second amended complaint, and this motion was heard by Judge Judd on February 13, 1973. The District Judge reserved decision on all causes of action, except those relating to the alleged denial of effective assistance of counsel by the Legal Aid Society, and to the refusal of the Kings County Supreme Court to entertain pro se motions. The District Judge ordered an immediate hearing on these issues, and testimony was taken on February 21 and 22, 1973.

Shortly thereafter, on February 27, 1973, the District Court rendered a decision denying the motion to dismiss the second amended complaint. The District Court also ruled that plaintiffs could maintain the action as a class action, and it issued an order to that effect on March 29, 1973. The District Court issued another order on March 22, 1973 permitting plaintiffs to add certain named judges of the Kings County Criminal Court as representative parties defendant, but on April 2, 1973, it denied plaintiffs' motion to join as defendants the Justices of the Appellate Division, Second Department, and the Mayor, Budget Director, Comptroller and Council President of the City of New York.

On April 30, 1973, the District Court conducted a further hearing on the issue of control of the criminal calendar in Kings County. This hearing was ordered in the case of McLaughlin v. Justices of the Supreme Court, Kings County, a case which was similar to Wallace v. Kern, but was not a class action. On May 10, 1973, the District Court rendered a lengthy decision in the Wallace case and the McLaughlin case, granting a preliminary injunction on behalf

of plaintiffs-appellees. The District Court enjoined the clerk of the Supreme Court, Kings County from refusing to place pro se motions on the court's calendar, and enjoined the Legal Aid Society from accepting more than forty cases per lawyer. On May 22, 1973, the District Court issued a supplemental order, implementing its decision and order of May 10, 1973. (The issue of speedy trial was not considered at this time).

These orders were immediately appealed to this Court by the Legal Aid Society and by the appellant Justices of the Kings County Supreme Court (Docket Nos. 73-1826, 73-1830, 73-1831, supra). On June 27, 1973, this Court reversed the District Court's orders from the bench, holding that although it was sympathetic to the District Court's decision, the District Court could not intervene in the internal procedures of a state court and could not exercise jurisdiction over the Legal Aid Society under 42 U.S.C. § 1983. See 481 F. 2d 621 (2d Cir., 1973), cert. denied 42 U.S.L. Week 3387 (Jan. 7, 1974).

Subsequently, on July 20 and July 25, 1973, the District Court conducted hearings on plaintiffs' speedy trial claims. The District Court heard testimony from three inmates on the proceedings in their cases in the Kings County Supreme Court, and heard expert testimony from Bernard L. Segal, a defense lawyer and a professor of law, and Dr. Sheldon Cholst, a psychiatrist at the Brooklyn House of Detention. The District Court also heard testimony from Samuel Dawson, a former Legal Aid supervisor who practiced in the Kings County Supreme Court, and from Justice Vincent Damiani, the Assistant Administrative Judge of Kings County.

Mr. Segal testified that delays in bringing cases to trial resulted in five areas of prejudice to a criminal defendant: (1) denial of a constitutional right that can never be regained; (2) oppressive effects of lengthy pre-trial incarceration; (3) psychological effects of pre-trial incarceration, including anxiety about the outcome of the case; (4) impairment of effective assistance of counsel and (5) coercion of the defendant to accept less than his full measure of constitutional rights. Mr. Segal stated that lengthy pre-trial confinement inhibits a defendant in preparing his case, causes a defendant to lose his job or his

seniority rights, makes it more difficult for a defendant to communicate with his lawyer, adversely affects a defendant's relationship with his family, and induces a defendant to waive a jury trial and to accept a plea of guilty to the crime. Mr. Segal recommended that defendants be released on their own recognizances if their cases were not tried within six months, and that defense attorneys be limited in their caseloads to twenty five felony cases per lawyer.

Dr. Sheldon Cholst testified that he was associated with the Prison Health Service at the Brooklyn House of Detention, and that he devoted twenty to thirty hours per week at that institution for individual sessions and group therapy sessions. Cholst stated that lengthy pre-trial delays caused anxiety, uncertainty and resentfulness on the part of the inmates, and caused them to experience a higher than average rate of suicides and mental breakdowns. He said that these anxieties would be reduced if the inmates knew that their cases would be brought to trial within a definite period of time.

Samuel Dawson testified about cases that had been recently tried in the Legal Aid trial parts of the Kings County Supreme Court. He stated that in a number of parts the most recent cases tried were not the oldest cases on the calendar, but he did not know the reasons why the older cases had not been tried first. Dawson said that as a result of several hundred habeas corpus applications, the Legal Aid Society and the District Attorney were able to agree on guilty pleas in more than two hundred cases, but that the remaining cases were not tried more quickly. He said that the expansion of Legal Aid trial parts had not resulted in speedier trials, and he predicted that the total number of trials in 1973 would be less than the total number in 1972.

Justice Vincent Damiani testified about the steps that had been taken by the Kings County Supreme Court to relieve the heavy congestion of its criminal calendar. He said that the court had established conference parts to eliminate cases in which a defendant was willing to accept a plea of guilty, and that at times there were three conference parts, although generally there were two. He said that a digital system was instituted for a period of time

to eliminate fragmented representation by the Legal Aid Society, that State probation officers were used to clear up a backlog of cases that were awaiting sentences,* that judges were sent to the Brooklyn House of Detention to handle arraignments, that Justice Brownstein was assigned to the Brooklyn House of Detention in December, 1972 to handle bail conferences, that defendants were permitted to obtain a review of their bail by writing a letter to the court, and that the Legal Aid Society caseload was being limited in accordance with Judge Judd's order of May 10, 1973, although the order had been reversed on appeal.

Justice Damiani further testified that in January, 1973 there were 4,299 outstanding indictments involving 5,435 defendants, whereas in July, 1973 there were 3,358 indictments involving 3,964 defendants, a reduction of 941 pending indictments and 1,471 defendants in a period of approximately six months. He also testified that in September, 1972 the Kings County Supreme Court had twenty criminal term parts, whereas in September, 1973 the number would rise to thirty one parts, including five narcotic parts.

* The backlog in sentencing has been virtually eliminated since this lawsuit began.

(The New York Law Journal of April 8, 1974 indicates calendars for thirty two criminal term parts in Kings County, including two conference parts. In addition there is another part, Special Term, Part 10, for bail reduction motions). Justice Damiani also stated that renovations had been completed on the third floor of the court house (which would result in an increase in the number of detainees that could by handled by the court personnel).

On March 7, 1974, nearly eight months after the hearings on the speedy trial issues were concluded, the District Court rendered the decision which is the subject of this appeal. The District Court gave full credence to the testimony of Prof. Bernard Segal and Dr. Sheldon Cholst concerning the harmful effects of lengthy pre-trial confinement, and noted that there were cases in Kings County where detainees had been in jail for periods of sixteen, eighteen, nineteen, twenty-one and twenty-two months before their cases were finally disposed of by pleas of guilty. The District Court concluded that state remedies to obtain a speedy trial were largely ineffective because the District Attorney could try cases out of chronological order, private attorneys were

not adequately compensated and were not supervised, the New York courts were hostile to class actions, and the New York Court of Appeals decision in People ex rel. Franklin v. Warden, 31 N Y 2d 498 (1973), a test case, had resulted in only four defendants being given a preference for a speedy trial. The District Court also made reference to the testimony at hearings in Jenkins v. Malcolm and Valvano v. Malcolm, two cases in which the appellant Justices were not parties, and made reference to the observations of the Court's law clerk on a visit to the Kings County Supreme Court on March 4, 1974. The Court noted that the overall situation had improved since May, 1973, but it still fell short of the requirement of speedy trials.

The District Court ruled that plaintiffs had satisfied their burden of proving ultimate success on the merits of their speedy trial claim, and that a preliminary injunction would issue on their behalf, subject to a showing by the appellant Justices at trial, that the preliminary injunction should not be made permanent. The District Court stated that dismissal of indictments would not be a proper remedy, but that each detainee who had been in jail more

than six months would be entitled to request a speedy trial, and to be released on his own recognizance if not brought to trial within forty five days. The District Court held that its order was applicable immediately to any detainee who had been incarcerated more than one year, applicable in forty five days to any detainee who had been in custody more than nine months, and applicable in ninety days to any detainee who had been in custody more than six months. (See Opinion and Order of March 7, 1974, Appendix A).

On March 7, 1974, the same day that the District Court was filing its decision, the District Attorney of Kings County forwarded a report to the Court indicating that the number of pending indictments and the number of defendants whose cases were awaiting trial, had been further reduced to 2,501 indictments and 2,851 defendants. This represented a reduction of 41.8% in indictments and 47.3% in defendants since January, 1973. The report also showed that the total number of jailed defendants had been reduced 44%, from 1,723 in January, 1973 to 959 in March, 1974, and that the

number of defendants incarcerated more than six months had been reduced 38%, from 644 in May, 1973 to 398 in January, 1974. On March 8, 1974, the District Court issued a supplemental memorandum, stating that the statistics presented by the District Attorney showed substantial progress in reducing the backlog of criminal cases, but that the overall effect of them was to confirm the District Court's decision.

On March 26, 1974, the District Court issued a supplemental order implementing its decision. The order set forth the schedule noted above, except for detainees charged with murder, who were subjected to a nine month rule rather than a six month rule. The order required that it be posted in facilities where Kings County detainees were housed, and that it be distributed to incoming detainees upon arraignment in the Kings County Supreme Court. The order provided that delays caused by a detainee as a result of adjournments or other legal proceedings would be chargeable to the detainee only during the forty five day period after a request for a speedy trial had been made, but not during the six month or nine month period prior to such a request. (See Order of March 26, 1974, Appendix B).

On March 29, 1974, the District Court granted a stay until April 3, 1974, of the provisions of its order which required distribution of copies to all detainees and newly indicted defendants. On April 2, 1974 this Court granted a stay of the District Court's entire order pending appeal, and directed that the appeal be heard during the week of April 22, 1974.

POINT I

THE DISTRICT COURT'S ORDER REPRESENTS AN UNWARRANTED INTERVENTION INTO THE INTERNAL PROCEDURES OF A STATE COURT, AND SHOULD BE REVERSED UNDER THE RATIONALE OF BARKER V. WINGO, 407 U.S. 514 (1972).

In its earlier decision in this case concerning the District Court's limitation on the caseload of the Legal Aid Society, and the District Court's directive that the Clerk of the Kings County Supreme Court place all pro se motions on the court's calendar, this Court stated its position in a manner that was prophetic for the instant appeal:

> "Although the members of this court's panel were entirely sympathetic with the purposes which the district judge sought to accomplish by his order, we felt constrained to reverse on the law. Our opinion was delivered from the bench as follows:...'With relation to the order directed at the Court personnel we hold that under the principle known as comity a federal district court has no power to intervene in the internal procedures of the state courts'". (481 F. 2d at 622).

The appellant Justices of Kings County respectfully contend that an analysis of the District Court's orders of March 7 and March 26, 1974, in light of the Supreme Court's decision in Barker v. Wingo, 407 U.S. 514 (1972), will compel this Court to reach the same conclusion in the instant appeal, that it reached in the decision cited above.

The District Court's orders violate the principles of Barker v. Wingo in three significant respects: first, the orders establish a time limit for bringing cases for trial, contrary to the language in Barker that the right to a speedy cannot be quantified into a fixed period of days and months; secondly, the orders establish a speedy trial rule for an

entire class of pre-trial detainees, without regard to the facts of individual cases or the merits of individual speedy trial claims; thirdly, the orders provide that delay caused by a detainee shall be chargeable to him only during the forty five day period after he has requested a speedy trial, but not during the initial six months or nine months prior to such a request. To appreciate the seriousness of these errors, on examination of Barker v. Wingo is necessary.

In Barker the Supreme Court grappled with the problem of setting out the criteria by which the speedy trial right was to be judged. The court noted that the speedy trial right was generically different from other constitutional rights for the protection of the accused, because the societal interest in speedy trials was separate from, and, at times, in opposition to, the interests of the accused; because deprivation of the speedy trial right may work to the accused's advantage; and because the right to a speedy trial was a more vague concept than other procedural rights. (See 407 U.S. at 519-21).

The Court noted that it would be tempting to adopt either of two rigid approaches to eliminate the uncertainty that courts experience in protecting the speedy trial right, but it refrained from doing so. The first approach would have been to hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. Although the Court observed that this Circuit had adopted such a rule in the exercise of its supervisory authority over the district courts, it declined to sanction such an approach as a matter of constitutional law:

> "But such a result would require this Court to engage in legislative or rule making activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise". (407 U.S. at 523; emphasis added).

The Court also rejected another rigid approach which would have conditioned the speedy trial right upon a demand made by the accused. Under this approach an accused is deemed to have waived his right to a speedy trial for any period prior to which he has not demanded a trial. The Court rejected this rule because an accused has no duty to bring himself to trial, and because the rule places a defense counsel in an awkward position in asking for more time to prepare his case.

The approach adopted by the Court was a balancing test, in which the conduct of both the prosecution and the defendant are weighed. The Court noted that such a test compelled a consideration of speedy trial cases on ad hoc basis, and that four factors were determinative: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

With respect to length of delay the Court said that until there was some delay which was presumptively prejudicial, there would be no need to inquire into the other factors of the balancing test. However, whether a delay was presumptively prejudicial depended on the peculiar circumstances of each case, and not on a fixed period of time.

With respect to the reasons for the delay, the Court again rejected a fixed rule, and stated that different weights should be assigned to different reasons. Thus, a deliberate attempt to delay a trial should count more heavily against the prosecution than delay caused by overcrowded courts or the absence of a witness.

With respect to the accused's responsibility to assert his right to a speedy trial, the Court stated that a demand for a speedy trial was entitled to strong evidentiary weight in determining whether an accused was being deprived of the right, and that the failure to assert the right would make it difficult for an accused to prove that he was denied a speedy trial. With regard to prejudice to the accused, the Court noted that there were three interests which the speedy trial right was designed to protect: prevention of oppressive pre-trial incarceration; minimization of anxiety and concern; and limitation of impairment of an accused's defense by reason of delay. The Court stated that the third factor was the most serious because the inability of an accused to prepare his case, skews the fairness of the entire system.

Finally, the Court reiterated its fundamental position, which is critical to the instant appeal:

> "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution". (407 U.S. at 533; emphasis added)

Returning to the issues at bar, it becomes apparent in the light of Barker why the orders below should be reversed. Barker specifically teaches that neither the constitutional right to a speedy trial, nor the time period in which delay becomes presumptively prejudicial, can be reduced to a fixed number of days and months. Rather the court must perform an adjudicative balancing test, in which a number of factors are weighed, including the length of delay, the assertion of the right, the possible impairment of the defense, the

status of court calendars, the good faith of the prosecution and the availability of witnesses. The need for such an approach is also dictated by this Court's decisions where the Barker tests were applied. See, e.g., United States v. Lasker, 481 F. 2d 229, 237 (2d Cir. 1973)(no denial of right to speedy trial where defendant did not assert the right and did not suffer substantial prejudice); United States v. Nathan, 476 F. 2d 456, 461 (2d Cir. 1973)(no denial of speedy trial right where no purposeful delay and both sides were partly responsible for slow pace of the proceedings); United States v. Infanti, 474 F. 2d 522, 527-29 (2d Cir. 1973)(no sixth amendment violation found after weighing all of the Barker v. Wingo factors).

The orders of the District Court, which compel the Kings County Supreme Court to bring felony cases to trial within a fixed period of months and days, and which grants this relief to an entire class of detainees without regard to the facts or merits of individual cases, is directly contrary to the rationale and philosophy of Barker v. Wingo. Rather than require the state court to weigh the four primary factors in Barker before deciding whether the speedy trial right has been violated in each case, the District Court

established a procedural rule for the state court, in direct contradiction to the language in Barker that the Supreme Court would not "establish procedural rules for the States, except when mandated by the Constitution". (407 U.S. at 523, supra).

The District Court's refusal to consider adjournments or delay caused by a detainee as grounds for tolling the initial six month or nine month period, is a further error that requires reversal by this Court. In Barker the Supreme Court made it clear that although an accused has no duty to bring his case to trial, his conduct prior to trial is one of the factors that must be weighed in the balancing test. Thus, a trial court may "attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection". (407 U.S. at 529). In Barker the Supreme Court noted that Barker himself did not want a speedy trial, and that this fact was to be weighed heavily against him.

The refusal of the District Court to charge delays against a detainee during the initial six month or nine month period is also contrary to the Rules of this Court Regarding Prompt Disposition of Criminal Cases (Rule 5), and contrary to the decisions of this Court, cited above, where the conduct of the defendant was weighed in adjudicating his rights under the Sixth Amendment. See also United States v. Counts, 471 F. 2d 422, 427 (2d Cir. 1973)(delay occasioned partly by ruling on defense motions); United States v. Fasanaro, 471 F. 2d 717 (2d Cir. 1973)(defendant "never wanted a speedy trial at all since he might reasonably have hoped that the principal government witness would never be found"); United States v. Saglimbene, 471 F. 2d 16 (2d Cir. 1972) (defendant was content to wait and hope that missing co-defendant would never be found).

Finally, it should be emphasized that although the District Court stopped short of the drastic remedy of dismissing indictments as a means of enforcing the speedy trial right in Kings County (but Cf., Strunk v. United States, 412 U.S. 434 [1973]), the distinction between dismissing indictments and releasing detainees on their own recognizance is one without a difference, with respect to many of the Kings County detainees currently awaiting trial. Of the 398 detainees who

were awaiting trial in January, 1974 more than six months, thirty-five percent of them were charged with murders, and the remainder had not made bail because they were charged with serious crimes or had past criminal records. The imminent release on their own recognizances of defendants in these categories will exert as much pressure on the prosecutor and the state court to bring their cases to trial within the time period established by the District Court, as if the District Court had ordered an outright dismissal of indictments. Indeed the intention of the District Court to accomplish this result was made manifest by the statement in its decision that:

> "The risk to the [appellants] and the public from the release of a dangerous defendant or one who may abscond, can be avoided by providing appropriate procedures and personnel to bring him to trial promptly". (Appendix A, p. 20).

In United States ex rel. Frizer v. McMann, 437 F. 2d 1312 (2d Cir. 1971), cert. denied 402 U.S. 1010 (1971), and Thorne v. Warden, 479 F. 2d 297 (2d Cir. 1973), this Court expressed its concern for the overcrowded facilities and the delays in trial that were occurring in the counties of New York metropolitan region in general, and in Kings County

in particular. Undoubtedly this concern was shared by the District Court in promulgating what is tantamount to a constitutional speedy trial rule for Kings County. However, the District Court must conform its constitutional rulings to the mandates of the United States Supreme Court, and it cannot evade the entire approach and philosophy of Barker v. Wingo by ordering the release of detainees on their own recognizances rather than by dismissal of indictments. In addition, the District Court must tread lightly in the area of pending State criminal prosecutions, because the Supreme Court has indicated that federal intervention is appropriate only in extraordinary circumstances, to avoid duplicative legal proceedings and the disruption of the State criminal justice system. See Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971). Cf. Steffel v. Thompson, 42 U.S.L. Week 4357 (March 19, 1974).

Regardless of whether this Court is "sympathetic with the purposes which the district judge sought to accomplish by his order,"(Wallace v. Kern, supra at 622), this Court must again reverse the orders below as a matter of law.

POINT II

THE DISTRICT COURT'S ORDERS SHOULD ALSO BE REVERSED UNDER PREISER V. RODRIGUEZ, 411 U.S. 475 (1973). THE DISTRICT COURT HAD NO POWER TO ORDER THE RELEASE FROM CUSTODY OF AN ENTIRE CLASS OF STATE DETAINEES WITHOUT EXHAUSTION OF STATE REMEDIES.

Although the instant case was brought as a civil rights action under 42 U.S.C. § 1983 rather than a habeas corpus proceeding under 28 U.S.C. § 2254, the District Court nevertheless ordered the release from custody of all members of plaintiffs' class who are not brought to trial within the time limits set by the District Court's order. This was a clear violation of the Supreme Court's decision in Preiser v. Rodriguez, 411 U.S. 475 (1973), which holds that the exhaustion requirements of the habeas corpus statute cannot be evaded by seeking release under the civil rights act.

In support of its decision, the District Court made no finding that the members of plaintiffs' class had actually exhausted their state remedies, but held instead

that state remedies were ineffective. As we have noted this holding was based on the Court's findings that the District Attorney was able to try cases out of chronological order, that private defense attorneys in Kings County were underpaid and unsupervised, that New York courts were hostile to class actions, and that the New York Court of Appeals decision in People ex rel. Franklin v. Warden, supra, had resulted in a preference for only four defendants. These reasons are insubstantial, and do not warrant an undermining of the rationale in Preiser that litigation involving state prisoners is best handled in the first instance by the state courts. See also Picard v. Connor, 404 U.S. 270 (1971)("We emphasize that federal claims must be fairly presented to the state courts").

In deciding the efficacy of state remedies, it must be emphasized that in the past year the number of pending cases and the number of detainees awaiting trial more than six months in Kings County, has decreased by approximately forty percent. At the same time the number of trial parts in Kings County has increased by one third. While these substantial gains cannot eliminate the backlog of cases overnight, they are indications that the state court's own efforts to expedite its caseload are having a significant effect.

In addition the reduction in pending cases and the increase in trial parts will make more meaningful the remedy established by the New York Court of Appeals in People ex rel. Franklin v. Warden, supra, namely to grant a preference to a defendant who establishes that his Sixth Amendment rights have been violated. While this Court criticized the preference system in Thorne v. Warden, supra, as being prejudicial to defendants who do not assert their speedy trial rights (see 479 F. 2d at 299, n. 2), this criticism was made against a background of an increasing rather than a decreasing number of felony cases, and against a background of twenty one trial parts rather than thirty two criminal term parts.

The District Court made reference to the fact that in the summer of 1972, the Legal Aid Society brought 400 speedy trial motions, and that this resulted in 202 detainees being released on their own recognizance or on low cash bail. The testimony before the District Court also indicated that Justice Brownstein had conducted massive bail conferences at the Brooklyn House of Detention in December, 1972, resulting in the release of further inmates. Justice Damiani testified that bail review has been encouraged and that any prisoner can

write a letter and ask for bail review and have his case placed on the calendar (as noted, bail review applications are heard in Special Term, Part 10, which is separate from the criminal term trial parts). In view of these avenues of redress that are available to a detainee who has experienced lengthy incarceration, there is no basis for the District Court's blanket holding that state procedures are so ineffective as to obviate the need for exhaustion of remedies under Preiser and under 28 U.S.C. § 2254.

The District Court's findings that the District Attorney may try cases out of order or that private defense attorneys are underpaid or unsupervised, provide even less basis for holding that the speedy trial right cannot be protected by the state courts. Apart from the fact that there is no proof that the District Attorney's calendar practices or the low payments to 18B attorneys has deprived any particular inmate of a right to a speedy trial, a legal conclusion that state remedies are ineffective for 400 detainees should be based on more than a supposition that underpaid lawyers will not make speedy trial motions for their indigent clients, or

that the District Attorney may gain an advantage in some instances by trying cases out of order (It is worth noting that the testimony of a state justice, Thomas Jones, indicated that when cases are tried out of order in his court, it is to make use of judicial time, that had been alloted to other cases which were unavoidably postponed).

The District Court's conclusion that the New York courts are not hospitable to class actions, is also not a basis for evading the exhaustion requirements of the habeas corpus statute. As we discussed at length in Point I, supra, the issue of whether an accused has been denied his Sixth Amendment right to a speedy trial, is one which depends on an evaluation of the four factors in Barker v. Wingo, supra, and must be determined on a case by case basis. As such it is not an issue that is susceptible to a class adjudication since there are no detainees in Kings County whose cases are identical, other than co-defendants who are accused of the same crime, arrested on the same day, held on the same amount of bail and represented by the same lawyer. The District Court's observations concerning class actions in New York are irrelevant because Barker instructs that in deciding speedy trial claims, "courts must still engage in a difficult and sensitive balancing process". (407 U.S. at 533).

In sum, the portions of the District Court's order which provide for the release of detainees from custody, who have not been tried in accordance with the time schedules set forth in the District Court's decision, are contrary to the holding of Preiser v. Rodriguez, and should be reversed. In the interests of comity a federal court should not release a detainee from state custody unless state remedies have been exhausted or unless the detainee actually has been obstructed in obtaining relief in the state courts.

POINT III

THE EFFECT OF THE DISTRICT COURT'S ORDER IS TO RE-INSTATE A SPEEDY TRIAL RULE FOR THE STATE COURT, CONTRARY TO THE EXPRESS INTENT OF THE NEW YORK LEGISLATURE IN ENACTING SECTION 30.30 OF THE CRIMINAL PROCEDURE LAW. THE DISTRICT COURT FAILED TO CONVENE A THREE JUDGE COURT OR EVEN TO CONSIDER THIS ISSUE.

It is elementary that a federal court cannot enjoin the operation of a state statute without convening three judges pursuant to 28 U.S.C. §§ 2281, 2284. In the instant case the District Court virtually prevented the enforcement of Section 30.30 of the New York Criminal Procedure Law by establishing the same type of speedy trial rule that was specifically rejected by the Legislature in enacting Section 30.30.

As the District Court noted in its decision, prior to the enactment of Section 30.30, the New York State Judicial Conference promulgated a speedy trial rule which provided for the release from custody of any detainee (other than in homicide cases), who was not brought to trial within ninety days, 22 N.Y.C.R.R. 29.1-29.7. This was to become effective on May 1, 1972, but on April 28, 1972 the Legislature amended Section 30.30 to provide only that the prosecution be ready for trial within a specified period of time. The act of the Legislature also provided that the speedy trial rule of the Administrative Board of the Judicial Conference was superseded, and of no force or effect. By re-instating a rule which is similar to the rule promulgated by the Judicial Conference, and by ordering the release from custody of detainees who have not been brought to trial within six months and forty five days or nine months and forty five days, the District Court was clearly nullifying the 1972 act of the Legislature which rejected the speedy trial rule of the Judicial Conference. In addition, the District Court effectively nullified the provisions of Section 30.30, which require readiness for trial by the prosecution, and which hold adjournments and delays caused by a defendant to be chargeable to him in determining

speedy trial motions. Without further elaboration, this virtual nullification of a state statute could only have been effectuated by a three judge panel, or in the alternative, the District Court should have considered the issue before promulgating its own speedy trial rule.

Finally, the nature of the relief granted by the District Court makes clear that this action was directed against the Kings County Supreme Court as an entity, and not against judges as persons within the meaning of the Civil Rights Act. The Kings County Supreme Court is not amenable to suit under 42 U.S.C. § 1983, Zuckerman v. Appellate Division, 421 F. 2d 625 (2d Cir. 1970), and the naming of judges as defendants cannot be used as a means for nullifying state statutes or establishing procedural rules for state courts.

CONCLUSION

FOR ALL OF THE ABOVE REASONS THE ORDERS BELOW SHOULD BE REVERSED.

Dated: New York, New York
April 10, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

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Assistant Attorneys General
of Counsel

APPENDIX A

(Decision and Order of
District Court, dated
March 7, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD WALLACE, et al., : 72-C-898

Plaintiffs, :

- against - :

MICHAEL KERN, et al., :

Defendants. : March 7, 1974

Appearances:

STEPHEN M. LATIMER, ESQ.

DANIEL L. ALTERMAN, ESQ.
JAMES REIF, ESQ.
ROBERT L. BOEHM, ESQ.
WILLIAM M. KUNSTLER, ESQ.
Center for Constitutional Rights

ALVIN J. BRONSTEIN, ESQ.
NANCY CHRISMAN, ESQ.
National Prison Project

Attorneys for Plaintiffs

HON. LOUIS J. LEFKOWITZ
Attorney General, State of New York
Attorney for State Defendants

By: HILLEL HOFFMAN, ESQ.
Assistant Attorney General
of Counsel

FPI—SS—3-17-72—30M—9153

Appearances (continued):

HON. NORMAN REDLICH
Corporation Counsel, City of New York
Attorney for City Defendants

By: JOHN P. NACHAZEL, ESQ.
JEFFREY FRIEDMAN, ESQ.
Assistant Corporation Counsel
of Counsel

MARY D. PICKMAN, ESQ.
Counsel for N.Y.C. Board of Correction
Amicus curiae

ROBERT HERMAN, ESQ.
Attorney for Legal Aid Society
Amicus curiae

J U D D, J.

MEMORANDUM OF DECISION

Plaintiffs in this class action have moved for a preliminary injunction to assure their right to a speedy trial or to release from custody.

Facts

The action is brought on behalf of all felony defendants confined at Brooklyn House of Detention for Men (BHD) pending indictment, trial or sentence. Among numerous rights which the action seeks to enforce is the constitutional right to a speedy trial for persons held in custody because of their inability to provide money bail. The

second amended complaint asks for the dismissal of charges or the release on their own recognizance of all criminal defendants who have not been cried within six months after their commitment.

The problem of trial delays in Kings County Supreme Court is one of long standing. Trial delays in the metropolitan counties were described in 1971 as "notorious" and "chronic," in an opinion by the Second Circuit Court of Appeals. United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1315. The same court noted in 1973 that serious delays continued. United States ex rel. Thorne v. Warden, Brooklyn House of Detention for Men, F.2d , May 16, 1973. The New York Legislature early in 1972 (L. 1972, c. 496, § 1) enacted a finding that "there is an emergency of grave dimensions in the processing of felony charge cases in the criminal courts in the metropolitan counties of the state." The legislature appropriated $6,700,000 to be used, with federal and local funds, for an emergency felony case processing program.

In December 1972, there were 644 defendants who had been confined in BHD for more than six months. During the first three months of 1973, the Legal Aid Society

obtained twelve acquittals of defendants who had been in jail for periods ranging from twelve to fourteen months. Four BHD inmates who testified in this court in April 1973, had been confined from thirteen to seventeen months awaiting trial.

On July 9, 1973, there were 707 persons named in indictments in Kings County Supreme Court who had been in custody for more than six months, and 210 of these had been in custody for more than a year. This represented almost 44 percent of the total 1,614 defendants in custody. Some of these were awaiting sentence, but the vast majority were awaiting trial.

A witness in Valvano v. Malcolm, 70-C-1390, testified in January 1974 that he had just been acquitted on a murder charge after being in jail in BHD for fourteen months. An affidavit for plaintiffs listed details concerning six inmates who had been held from eight to twenty months awaiting trial, in spite of an aggregate of fourteen speedy trial motions.

Trial delays are reflected in overcrowding of both BHD and QHD. Although the rated capacity of BHD is 840, it housed an average of 1,391 during 1973, or over 160 percent

of capacity. Because of the overcrowding at BHD, there were 200 pretrial detainees on Kings County indictments housed in Queens House of Detention for Men (QHD), which was at 131 percent of capacity on July 9, 1973. Although both institutions were designed to hold one inmate in each cell, there was still double occupancy in almost all cells in QHD in January 1974 when the Warden testified before this court in the Valvano case. The occupancy of BHD had been reduced to 995 or about 125 percent of capacity by January 1974, but there was still double occupancy of a large proportion of the cells. The cells are approximately five feet by eight feet in dimensions.

The New York City Board of Correction in its amicus curiae brief cites a number of cases involving detainees, which serve to highlight the impact of lengthy pretrial confinement.

After being held in jail for twenty-two months, "W" pleaded guilty on June 13, 1973 to a robbery charge. He has been released on $250 bail, with the expectation that he would be placed on probation. His case had been marked ready and passed fifty-five times. While in jail, he was severely beaten by other inmates, and sustained a shoulder

injury, from which he still suffers.

"M" was in jail for nineteen months before pleading guilty on June 14, 1973 to a robbery charge, at a time when he claimed to have lost contact with witnesses who might have aided him.

"Harold S." was in jail for twenty-one months and had attempted suicide during a period of despondency, before he finally pleaded guilty on June 29, 1973 to manslaughter.

"Herbert S." was in jail for sixteen months before pleading guilty on May 9, 1973 to third degree robbery. Only after his plea was he transferred to Rikers Island, where he received hospital treatment for swollen glands from which he had suffered for over six months.

"D" was in jail for eighteen months before obtaining a Wade hearing, which was followed by a guilty plea to a reduced robbery charge on June 19, 1973. In spite of his plea, he still maintains his innocence.

State Court Remedies

Efforts at relief in the state courts have been largely unsuccessful. Under the leadership of Chief Judge Fuld, the Administrative Board of the Judicial Conference on May 3, 1971 adopted a speedy trial rule, which would have

required release after ninety days in custody without a trial, except in homicide cases. 22 NYCRR 29.1-29.7. This rule was not to become effective until May 1, 1972. Before then the legislature enacted its own plan, requiring only that the People be ready for trial within ninety days, the legislature stating that its enactment "shall be deemed to supersede any rule of the Administrative Board of the Judicial Conference." CPL § 30.30, as amended by L. 1972, Chap. 184, effective April 28, 1972.

Following the enactment of Section 30.30, the Legal Aid Society attempted to secure the release of detainees in custody more than six months. William Gallagher, Director of Court Operations for the Legal Aid Society, testified that in the summer of 1972 the Society brought 400 speedy trial motions before the Appellate Division, Second Department, that the Acting Presiding Justice directed a conference with the District Attorney concerning bail, that a Supreme Court Justice released 202 defendants on their own recognizance or low cash bail, but denied the other motions, and that no trial dates were set for the other defendants.

After being unsuccessful in the Appellate Division, the Legal Aid Society took four test cases to the New York

Court of Appeals, which on February 16, 1973 directed that the cases be granted a trial preference to assure the commencement of trial within three months thereafter. People ex rel. Franklin v. Warden, 31 N.Y.2d 498, 341 N.Y.S.2d 604. The Court said (31 N.Y.2d at 502-04, 341 N.Y.S.2d at 607-08):

> We recognize that the four cases now before us are typical of the vast pretrial felony backlogs in the County of Kings and perhaps to a lesser degree in other metropolitan counties. . . .
>
> It may be urged that the disposition we make in the cases now before us is unfair to other detainees similarly situated in Kings County. We would only note that it does not appear that all or any of such other detainees actually desire to go to trial. . . The ultimate remedy must be provision by the appropriate branches of government of the material and personal resources required to handle a court burden increased and increasing. . . .

The obstacles to obtaining a speedy trial are aggravated by various practices in Kings County Supreme Court. (1) The District Attorney can pick any one of the first forty cases on the calendar in a part to bring to trial, while a defense counsel cannot be adequately prepared on more than a few cases at a time. While the Deputy Chief of the Supreme Court Bureau in the District Attorney's office testified that Legal Aid receives notice from forty-eight

hours to a week before a case is brought to trial, the court finds that his directions to this effect are not generally followed. (2) Compensation to private attorneys assigned under Article 18-B of the County Law is still limited by statute to $15.00 an hour for court time and $10.00 an hour for out-of-court time; but even this amount is usually cut. They are thus discouraged from making speedy trial motions. The Administrator of the Indigent Panel for the Second and Eleventh Judicial Districts testified that attorneys almost never receive the dollar amount requested on an hourly basis. (3) There is no provision for supervision of 18-B attorneys by any experienced attorney.

It may be noted, however, that the burden on the Legal Aid Society staff has been reduced since this court's order of May 10, 1973. Administrative Justice Vincent D. Damiani of the Criminal Part, Kings County, testified on July 25, 1973 that Legal Aid was not being assigned new cases until the suggested standard of not more than forty felony cases per lawyer was met.

Under existing calendar practice, as described by Samuel Dawson, Associate Attorney in charge of the Supreme Court office of Legal Aid Society in Kings County, the fact

that a case is marked ready and passed does not necessarily mean that the District Attorney is ready, but is simply a formal method of compliance with the readiness rule.

"The system isn't working," according to Peter Purvis, Deputy Director of Operations for the Legal Aid Society. Everything is being done which the facilities permit, but defendants still are not being tried promptly.

Effects of Prolonged Pretrial Detention

Prolonged detention creates various types of harm for defendants. One problem is the inducement to plead guilty rather than wait for trial, as mentioned by Mr. Justice Thomas R. Jones in his testimony. Professor Bernard Segal of Golden Gate University testified that prolonged pretrial incarceration involves (1) loss of an irretrievable right to freedom, (2) lack of compensation for lost time if found innocent, (3) excessive anxiety and concern, (4) substantial impairment to the right of counsel, with a tendency to rely on other inmates as lawyers' visits become less frequent and less constructive, (5) personal hardship resulting from the inability to keep a job open and the strain on family relationships, and (6) coercion to accept a guilty plea rather than to claim a defendant's full consti-

tutional rights or even to assert believable defenses. He pointed out that deterioration of a detainee accelerates materially after three months, with family visits becoming less frequent. Dr Sheldon Cholst, a psychiatrist with the Prison Health Service at BHD, testified that prolonged pre-trial confinement creates tremendous anxiety, a tendency to become hardened and embittered, a suicide rate 25 times as high as the general population, and twice as many breakdowns as the general population. There is no way of earning money at BHD, no cigarettes are supplied to people without funds, and there is pressure to enter homosexual situations in order to obtain small amounts of money. According to Dr. Cholst, the psychological situation of state prisoners who know the length of their sentences is much better than that of detainees who are uncertain of the time or consequences of trial. The testimony of Professor Segal and Dr. Cholst was not effectively impeached or contradicted, and is accepted by the court as true.

Improvements to Date

The court has given full consideration to the fact that more than six months have elapsed since the close of the hearings. The necessary deliberation and preparation of this

decision have been unduly delayed by an accumulation of other urgent motions and cases and by an almost continuous series of trials. The continuance of the problem is indicated by a number of facts, including the testimony received during January and February 1974 in two class actions involving inmates both at BHD and QHD. Jenkins v. Malcolm, 73-C-261; Valvano v. Malcolm, supra. Some of this testimony has already been mentioned.

The flow of speedy trial habeas corpus petitions to this court from Kings County defendants has continued during late 1973 and early 1974. The fact that they were filed pro se, by inmates who have counsel, appears to reflect a belief by counsel that state courts do not provide an effective remedy. The writer's share of such petitions has included at least four where pretrial confinement ranged from twelve to seventeen months, four others where the total period in custody has not been checked, and one which challenged a guilty plea as having been coerced by pretrial delay.

In fact, during the time this memorandum was being drafted, the District Attorney's office had just begun the trial of a defendant in custody since December 1972,

whose trial after fourteen months was precipitated by an order of this court dated January 30, 1974 directing his release on his own recognizance unless his trial began before March 1, 1974. United States ex rel. Jerome Perry v. Warden, Brooklyn House of Detention (73-C-1666).

The number of criminal parts was increased during 1973 so that there are now thirty-one parts in the criminal term, some of them operating on a twelve-month basis. During 1973, the number of indictments in Kings County also decreased, a fact which should give an ultimate potential of reducing trial delays. Monthly meetings are held on overcrowding and trial delay, attended by the Administrative Judge for the Criminal Part in Kings County, the Administrative Judge for the Supreme Court in Staten Island, the Chief Probation Officer and representatives of the District Attorney's office, Legal Aid Society, the Correction Department, and ancillary services.

A current comment on the Criminal Calendar in Kings County is contained in "From the Editor's Desk" in the March 1974 issue of the Brooklyn Barrister (Vol. 25, p. 99):

> The Criminal Term Parts have no calendar numbers and the District Attorney is responsible for selecting and moving cases

for trial. The office of the District Attorney has been obliged to increase its staff but even so seems to be unable to promptly move cases for trial. Judges willing and anxious to try cases must still await the pleasure of the District Attorney.

When this court's Law Clerk assigned to this case visited the Supreme Court on March 4, 1974, he examined the ready calendar for four parts. In three of the four parts, more than 50 percent of the cases marked ready involved indictments filed in 1972 or earlier. The figure for the fourth part was 48 percent. In the four parts, there were 105 pre-1973 cases awaiting trial, only 67 cases involving 1973 indictments, and only 4 involving 1974 indictments. This is an improvement from the situation a year ago as noted in this court's memorandum of May 10, 1973 (p. 6), but it still falls far short of speedy trials. Of the calendars for 28 parts examined, only one had a 1973 case at the top of the list.

The Law Journal listings for criminal cases in Kings County do not give calendar numbers for criminal cases, as they did a year ago, although calendar numbers are listed for all civil cases.

Chief Judge Charles D. Breitel has initiated steps

which may be ameliorative by designating, in cooperation with the four Appellate Divisions, an Administrative Judge for the entire state, and by obtaining the concurrence of the First and Second Department Appellate Divisions in designating Justice David Ross as City Administrative Judge. N.Y.L.J. February 28, 1974, p. 4. It is impossible, however, to predict how long it may take the new machinery to correct conditions which have existed for a considerable period of time in Kings County Supreme Court.

Discussion

Over-long confinement without trial is a denial of constitutional rights. The Sixth Amendment right to "a speedy and public trial" is now applicable to the states. Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967).

"Speedy" is a relative word, which may properly be interpreted differently for one who is confined in jail than for one who is at large. Since an unconvicted defendant in a detention facility actually enjoys fewer amenities than a convicted prisoner in a correctional institution, over-long confinement without being convicted, simply for being poor, is also a denial of due process of law. Rhem v. Malcolm, 70-C-3962 (S.D.N.Y. 1974); Inmates of Suffolk Co. Jail v.

Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973); Inmates of Milwaukee Co. Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972).

Defendants assert that relief cannot be given in this action until each individual defendant has exhausted his state rights. However, this is not the sole test under 28 U.S.C. § 2254. Subdivision (b) specifies:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (Emphasis supplies).

As pointed out above with respect to the Franklin case, a year's effort by the Legal Aid Society resulted in only four prisoners being granted trial preferences effective after more than nine months of confinement. People ex rel. Franklin v. Warden, 31 N.Y.2d 498, 341 N.Y.S.2d 604 (1973). State court remedies have not substantially reduced detention times.

This is a situation where the federal court may dispense with the process of "waiting for Godot." St. Jules v. Beto, 462 F.2d 1365, 1366 (5th Cir. 1972). Individual

cases might obtain relief in the state courts, for the New York Court of Appeals has recognized that a person may not be subjected to "a greater deprivation of personal liberty than is necessary to achieve the purpose for which he is being confined." Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 350 N.Y.2d 889, 892 (1973). Individual action on behalf of hundreds of indigents has proved to be an ineffective remedy, however, in the state courts.

The hostility of New York State courts to class actions makes it impossible to obtain effective state relief where a large number of prisoners are suffering similar loss of rights. In Gaynor v. Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584 (1965), the Court of Appeals sustained the dismissal of a class action by Negro citizens of New York against labor unions in the construction industry in spite of

> . . . a grave and continuing breach by the defendant unions of the laws and declared policy of this state against the reprehensible practice of discrimination on racial grounds in the area of employment and employment opportunity.

15 N.Y.S.2d at 128, 256 N.Y.S.2d at 589. See also Hall v. Coburn Corp., 26 N.Y.2d 396, 311 N.Y.S.2d 281 (1970).

On the basis of the Gaynor case, a suit challenging

state facilities for the treatment of the mentally retarded in the Buffalo area was dismissed on the ground that it was not a proper class action, although Mr. Justice Walter J. Mahoney had found that the problems of the named plaintiffs were not unique but were comparable to those of hundreds of others. Usen v. Sipprell, 71 Misc.2d 633, 336 N.Y.S.2d 848 (Sup.Ct. Erie Co. 1972), rev'd, 41 A.D.2d 251, 342 N.Y.S.2d 599 (4th Dept. 1973).

Professor McLaughlin in his Supplementary Practice Commentary on NYCPLR § 1005, McKinney's, Vol. 7B, pp. 74, 76 (Cumulative Annual Pocket Part), stated:

> The Court of Appeals' most recent contribution to the law of class actions leaves the darkness largely unobscured. . . .
>
> These cases highlight the chaotic and incomprehensible state into which class actions have fallen in this state.

Class actions are as much of a burden to the federal courts as they would be to the state courts, but, in the language of Judge Jack B. Weinstein of this court, addressing a symposium of the Judicial Conference of the Fifth Circuit on the alleged abusiveness of class actions, 58 F.R.D. 299, 305 (1973),

> Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving all our citizens . . . or we are not.

Defendants contend that the relief requested is barred by Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827 (1973). Preiser, however, merely held that the exhaustion requirement of 28 U.S.C. § 2254(b) in a habeas corpus proceeding could not be avoided by labelling the proceeding as a civil rights action under 42 U.S.C. § 1983. In the present case, however, the court has determined that, even if the case is properly cognizable only as a habeas corpus action, the exhaustion requirements of Section 2254(b) have been met, to the extent of a showing that state remedies are ineffective.

Preliminary Injunction

In determining a plaintiff's right to a preliminary injunction, the court should consider the degree of likelihood of ultimate success on the merits, and the relative hardships to both parties. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), cert. denied, 394 U.S. 999, 89 S.Ct. 1595 (1969).

The facts, developed at hearings which have been so

extensive that they almost constitute the basis for a final determination, show that ultimate success on the merits is likely. The irremediable hardship on plaintiffs from prolonged incarceration is evident. The risk to the defendants and the public from the release of a dangerous defendant or one who may abscond, can be avoided by providing appropriate procedures and personnel to bring him to trial promptly.

Normally, a preliminary injunction is used to preserve the status quo, but sometimes a mandatory injunction is necessary where, as then Circuit Judge Taft stated in Toledo A.A. & N.M. Ry Co. v. Pennsylvania Co., 54 Fed. 730, 741 (C.C.N.D. Ohio 1893),

> . . . it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from.

The extent of amelioration of trial delays since the case began is not decisive on the right to a preliminary injunction. If the defendants in this case can show that the constitutional rights of pretrial detainees in Kings County are being protected when this case is ready for final decision on the merits, they may argue against the necessity of converting the preliminary injunction into a permanent one.

This court should not delay, however, in enforcing the federal rights of such detainees at this time. The effect of the Franklin case on the question of abstention was treated in this court's memorandum of February 27, 1973 (p. 10), but what has already been said shows that this is not a proper case for abstention.

Dismissal of Indictments

Plaintiffs seek not only a prompt trial, but dismissal of indictments where a prompt trial is not granted. The latest rules on the constitutional requirement of a speedy trial were set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182 (1972). One of the four factors enumerated in Barker v. Wingo is prejudice to the defendant. The Court recognized three aspects of prejudice, namely, oppressive pretrial incarceration, anxiety and concern, and possible impairment of the defense, and stated that the last was the most serious. The right to release relates to the oppressive character of pretrial incarceration and to anxiety and concern. The right to dismissal relates to the impairment of the defense. The degree of impairment of defense varies with the circumstances, more than the other aspects of prejudice. The oppressive character of prolonged incarceration

does not differ vitally among different defendants, and therefore is particularly appropriate for relief in a class action. Without saying that a federal class action for dismissal of old indictments cannot be sustained under proper circumstances, it appears to the court that dismissal is not appropriate preliminary relief in this action.

Possible Exceptions to the Proposed Order

There may be instances where there is a special reason for permitting a defendant to be confined more than six months before trial; for example, if he is charged with murder for profit. On the settlement of the order the court will consider whether any exception from the requirement of speedy trial should be made, and if so whether this should be by general sub-classes, or should be left to individual determination, and whether a federal court should be concerned with individual exceptions.

The speedy trial rule proposed by the Administrative Board of the New York Judicial Conference in 1971 contained several exceptions, but they related to a ninety day limit on custody. This memorandum proposes a limitation which is really seven and one-half months between arrest and trial. Exceptions from such a rule are less justifiable.

A period of time should be granted for the state to conform its procedures with the speedy trial requirements now being announced by this court.

The court will grant a preliminary injunction directing that all defendants who have been held in custody for more than six months without trial be brought to trial within forty-five days after a written request or released on their own recognizances, but providing that the order shall apply immediately only to defendants who have been held in custody for a year or more; that it shall apply forty-five days after this date to defendants who shall have been held in custody for nine months or more; and that it shall apply ninety days after this date to all defendants who shall have been held in custody for more than six months. No bond should be required as a condition (F.R.Civ.P. 65(c)) to the preliminary injunction.

Settle order on three days' notice.

U. S. D. J.

FPI—SS—3-17-72—30M—9153

APPENDIX B

(Order of District Court,
dated March 26, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT, NEW YORK

DONALD WALLACE, et al., Plaintiffs, -against- MICHAEL KERN, et al., Defendants.	72-C-898

ORDER

Plaintiffs having moved for a preliminary injunction to protect their right to a speedy trial; and the Court having heard the testimony offered by plaintiffs and defendants on July 20, 1973, and July 25, 1973; and the Court having considered the affidavits and other documentary proof submitted by the respective parties; and due deliberation having been had; and the Court having filed its written memorandum of decision dated March 7, 1974;

NOW, on the motion of Stephen M. Latimer and Daniel L. Alterman, attorneys for plaintiffs, it is ORDERED that the defendant justices of the Kings County Supreme Court and the Kings County District Attorney shall comply with the following provisions:

1. In the case of all persons who have indictments, other than for murder, pending in the Kings County Supreme Court and who have been held for six calendar months or more in any institution under the care, custody, and control of the New York City Department of Correction or in the Ossining Correctional Facility, or in any other institution designated by the appropriate authority to house Kings County pretrial indictees, trial shall commence within forty-five days after submission of a written request for

trial, pro se or by counsel, to the clerk of the Criminal Term of the Kings County Supreme Court, with a copy sent to the District Attorney.

In the case of all persons who have indictments for murder pending in the Kings County Supreme Court and who have been held for nine calendar months or more in any institution under the care, custody, and control of the New York City Department of Correction or in the Ossining Correctional Facility, or in any other institution designated by the appropriate authority to house Kings County pretrial indictees, trial shall commence within forty-five days after submission of a written request for trial, pro se or by counsel, to the clerk of the Criminal Term of the Kings County Supreme Court, with a copy sent to the District Attorney.

Request and motions for a speedy trial submitted prior to March 7, 1974, shall not be considered "written requests" for purposes of this Order. This Order shall apply to all persons presently under indictment, and to all indicted persons subsequent to March 7, 1974.

2. The trial of all those indictees who were and continue to be incarcerated for more than six or nine months as of March 7, 1974 shall commence in the manner directed in paragraph 1 in accordance with the following schedule:

Length of Incarceration	45 Day Period Begins to Run
(for all indictees)	
1 year	from March 7, 1974
9 months to 1 year	45 days from March 7, 1974 (April 21, 1974)
(for all non-murder indictees)	
6 months to 9 months	90 days from March 7, 1974 (June 5, 1974)

3. In the case of any incarcerated indictee who has submitted a request for trial in accordance with paragraphs 1 and 2, and whose trial has not commenced by the forty-fifth day, plus any periods excluded by the terms of this Order, the clerk of the Criminal Term shall forthwith notify the Department of Correction in writing of that fact and the defendant Department of Correction shall forthwith release the indictee from custody.

4. If, after submitting a request for trial, an indictee or his counsel requests an adjournment, the forty-five day period shall be tolled during the period of the adjournment only, but not for a period longer than the length of the adjournment requested by the indictee. In no event shall a request for an adjournment be considered a waiver of any of the other provisions of this Order. No adjournment on motion of the District Attorney or the court, without the indictee's in-court oral or written consent, shall toll the 45 day period, unless the indictee refuses to appear in court after being directed to do so.

5. Any waiver of any provision of this Order or any consent to an adjournment must be made by the indictee on the record in open court, or by written consent of the indictee. If the indictee is not present in court, nor has given his written consent, no provision of this Order may be waived by counsel, and no adjournment granted shall toll the 45 day period. No defendant in this action shall, under any circumstances, require any person to waive any provision of this Order or to consent to any adjournment. Any delay caused by failure of the defendant Department of Correction to produce the accused in court will not toll the 45 day period.

6. Notice of the provisions of this Order in the form annexed ("The Notice") shall be posted in every day room in each

housing floor in the Brooklyn, Queens, Adolescent, Adult and Women's Houses on Rikers Island, Houses of Detention.

7. The notice shall be posted in a public place on every floor in every other institution which houses persons awaiting trial on indictments in Kings County Supreme Court. Only floors which house Kings County indictees shall be required to post said notice.

8. A copy of the notice shall be mailed by the clerk of the Criminal Term to every person under indictment in Kings County who is presently incarcerated in any institution other than those specified in paragraph 6.

9. The clerk of the Criminal Term shall give a copy of the notice to every person indicted in Kings County on the date of his arraignment on the indictment, if such person is remanded to an institution under the care, custody, and control of the defendant Department of Correction. Delivery of a copy of the notice to the person's attorney shall not be deemed sufficient.

10. Nothing in this Order shall be deemed to contradict the terms of any detainer or warrant lodged against the person submitting a request for trial.

11. If a person has more than one indictment pending in the Kings County Supreme Court the period of incarceration shall be deemed to run from the date of arrest of the earliest indictment, unless the later indictment(s) are for murder or for a crime allegedly committed while in custody. Any order granting release on recognizance which may be entered in compliance with the terms of this Order shall apply to all indictments pending against the individual.

12. Members of plaintiffs' staff shall be permitted to inspect the public areas and/or day rooms of any institution which houses Kings County indictees at any time during business

hours, after reasonable notice to the wardens of said institutions, for the purpose of inspecting the placement of the notice.

13. There shall be excluded in counting the 45 day period after written request for a speedy trial, the period or periods of the pendency of other proceedings concerning the defendant such as those set forth in section 30.30 (a) (4) of the Criminal Procedure Law of the state of New York.

/s/ Orrin G. Judd

U.S.D.J.

March 26, 1974
Brooklyn, New York

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellants herein. On the 10th day of April , 1974 , she served the annexed upon the following named person :

DANIEL ALTERMAN, ESQ.
STEPHEN LATIMER, ESQ.
Center for Constitutional Rights
853 Broadway
New York, New York 10003

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Mary Ko

Sworn to before me this
10th day of April , 1974

Hillel Hoffman
Assistant Attorney General
of the State of New York